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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

GERARD GATES,

Defendant and Appellant.

D072915

(Super. Ct. No. SCN360131)

APPEAL from a judgment of the Superior Court of San Diego County, Carlos O. Armour and Harry M. Elias, Judges. Reversed and remanded.

Nancy J. King, under appointment by the Court of Appeal, for Defendant and Appellant, Gerard Gates.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, Scott C. Taylor, Charles C. Ragland and Alana Cohen Butler, Deputy Attorneys General, for Plaintiff and Respondent.

Gerard Gates was convicted of four counts of robbery (Pen. Code,<sup>1</sup> § 211) and one count of attempted robbery (§§ 664, 211). Each conviction included a true finding that Gates used a firearm in the commission of the robbery. (§ 12022, subd. (b)(1).) Gates was sentenced to 50 years to life plus 19 years 8 months. On appeal, Gates challenges the court's denial of his second motion to represent himself at trial. Gates contends that the court denied his motion based on improper reasons. We agree; accordingly, we reverse the judgment and remand for new proceedings.

### FACTUAL AND PROCEDURAL BACKGROUND

Gates's original trial was set for October 4, 2016. However, it was continued: first at the request of the People, and then by Gates, when he made his first motion to proceed in pro per. After the proper admonitions, the court granted Gates's motion, and trial was continued to December 7, 2016.

On December 7, 2016, neither Gates nor the People were ready for trial. Gates reiterated the seriousness of his case and stated he needed more time to file and argue motions and prepare for trial. The court then said to Gates, "I always ask people in your status of pro per[ ] is do you still want to continue in pro per? Do you still want to represent yourself?" Gates replied: "Yes, I believe I should, Judge," because he did not "think defense counsel [was] going to fight [his] case the way that . . . [he was] going." The court agreed to let him proceed in pro per, but then Gates inquired if the same public defender would be reappointed should he relinquish his status. When he was assured that

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<sup>1</sup> All future code section references are to the Penal Code.

he would be represented by the same public defender, Gates agreed to relinquish his pro per status.

At trial call on February 27, 2017, Gates's counsel asked for another continuance. The court was prepared to grant it when Gates's attorney expressed concern about Gates's competency to stand trial. The court then suspended criminal proceedings and ordered a psychological examination and competency hearing.

At his competency hearing on April 28, 2017, the court found Gates competent to stand trial. Trial was set for June 28, 2017.

At the May 31, 2017 readiness conference, Gates moved for a second time to proceed in pro per and did not seek a continuance. The court denied Gates's motion, stating, "This case is getting old. I think that with the fact that you were pro per, you relinquished the pro per status previously, and the fact that your attorney felt that there were issues about your competency that required an examination of your competency, I don't feel it is appropriate for you to be in pro per status. And I'm going to deny your request at this point to represent yourself."

Then, over the objections of his counsel, Gates explained that he wanted to represent himself because he was making jurisdictional arguments that he believed counsel could not make on his behalf. Gates indicated his understanding of his Sixth Amendment right and the pro per motion process, stating that he wrote the motion himself, and that he understood the timeliness requirement and discretion of the court to reject an untimely motion.

The court then stated, "I think you should think about it a lot, since you have [eight] prior strikes and I made your offer of 45 years instead of 50, but you are looking at a lot more time [than] that. And I also have a doubt as to your ability to represent yourself because your attorney, who is a professional attorney, who has been here for a long time and has seen a lot of cases, felt at one point in time that you weren't even competent to assist him in your own defense. And the threshold for that is much lower than representing yourself and being competent. So I do have a doubt as to your competency."

Gates replied that he would like to "call for equitable of estoppel and bias so that [he could] file under Civil Rules and Procedures 37A of compelling answers as to why that is judge." The court responded, "I have no idea what you are talking about. I'm going to deny whatever request you just made." The court left the possibility open that it would change its mind on Gates's motion, but ultimately it did not, and the issue was not raised again.

Gates, represented by his original public defender, was tried in a bench trial and convicted of all counts on July 3, 2017. He timely appealed.

## DISCUSSION

Gates contends the court erred by denying his second request to represent himself. The People concede that the court's reasons for denying Gates's motion were improper, but contend that the order was correct for other reasons and should thus be affirmed. Because Gates met the three requirements for self-representation under *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*), as we discuss, we agree with Gates.

## A. Legal Principles

Criminal defendants have a Sixth Amendment right to self-representation. (*Faretta*, *supra*, 422 U.S. at p. 832.) Thus, a trial court must grant a defendant's motion to proceed in pro per if three conditions are met: (1) the defendant is competent and makes the motion voluntarily, knowingly, and intelligently; (2) the motion is timely; and (3) it is made unequivocally. (*People v. Stanley* (2006) 39 Cal.4th 913, 931-932 (*Stanley*).) Additionally, "the nature of the charge" or possible consequences of conviction are "irrelevant to the decision to grant or deny a timely proffered *Faretta* motion." (*People v. Joseph* (1983) 34 Cal.3d 936, 945 (*Joseph*).) "In determining whether a defendant's *Faretta* rights have been respected, the primary focus must be on whether the defendant had a fair chance to present his case in his own way." (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 177 (*McKaskle*).)

On appeal, we review the entire record de novo. (*People v. Dent* (2003) 30 Cal.4th 213, 218.) Even if the trial court denied the request for an improper reason, if the record as a whole establishes the request would properly be denied on other grounds, we will nonetheless affirm the judgment. (*Ibid.*) Because a criminal defendant has a constitutional right to effective assistance of counsel, a right that secures the protection of many other constitutional rights, "courts must draw every inference against supposing that the defendant wishes to waive the right to counsel." (*People v. Marshall* (1997) 15 Cal.4th 1, 23 (*Marshall*).) However, where a defendant has a constitutional right to represent himself at trial, a denial of that right requires a reversal of the judgment of

conviction. (*People v. Boyce* (2014) 59 Cal.4th 672, 702 [denial of knowing, unequivocal, and timely request is reversible per se].)

B. Analysis

1. *Competency & a Knowing, and Intelligent Decision*

Gates contends that the trial court's improper denial of his second *Faretta* motion was based on Gates's public defender's previous concern about Gates's competency to stand trial. The People concede that Gates's attorney's prior concern was an improper reason for denying Gates's second *Faretta* motion.

A pro per defendant must be competent, which means he must have the "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and . . . a rational as well as factual understanding of the proceedings against him." (*Dusky v. U.S.* (1960) 362 U.S. 402.) A competent defendant's " 'technical legal knowledge' is irrelevant" in a *Faretta* motion, "irrespective of how unwise" self-representation may seem. (*People v. Windham* (1977) 19 Cal.3d 121, 128 (*Windham*).) To proceed in pro per knowingly and intelligently, a defendant must be informed of, and understand the disadvantages of, self-representation and make the decision voluntarily. (*People v. Lopez* (1977) 71 Cal.App.3d 568, 574 (*Lopez*).)

In *Indiana v. Edwards* (2008) 554 U.S. 164 (*Edwards*), the U.S. Supreme Court addressed the problem of the mentally ill defendant who existed in the "gray area" between competency to stand trial and competency to represent himself, meaning the defendant understands the proceedings against him, but his severe mental illness limits his ability "to play the significantly expanded role required for self-representation," such

as conducting voir dire, examining witnesses, addressing the court, among other tasks. (*Id.* at pp. 172, 176-177.) The Court has consistently refused to establish dual competency standards (*Massey v. Moore* (1954) 348 U.S. 105, 108 [can be capable of standing trial but lack capacity to stand trial without benefit of counsel]) and refused to again in *Edwards*. (*Edwards*, at p. 178.) Instead, the Court granted trial courts a narrow avenue of discretion in this otherwise absolute landscape by holding that states may constitutionally deny a "gray area" defendant his right to self-representation if, after taking a realistic account of the defendant's competency, the court finds the mentally ill defendant is not competent to conduct his own defense. (*Ibid.*)

The California Supreme Court applied *Edwards* to California whole cloth, declining to dictate a higher competency standard for self-representation than is required to stand trial, and giving trial courts narrow discretion to require counsel if the court finds that "the defendant suffers from a severe mental illness to the point where he or she cannot carry out the basic tasks needed to present the defense without the help of counsel." (*People v. Johnson* (2012) 53 Cal.4th 519, 530 (*Johnson*); see *People v. Taylor* (2009) 47 Cal.4th 850, 881 ["[I]n the absence of a different California standard, . . . the court's finding that defendant was competent to stand trial compelled a further finding he was competent to represent himself."].) This discretion must be exercised with caution; "[a] court may not deny self-representation merely because it believes the matter could be tried more efficiently, or even more fairly, with attorneys on both sides." (*Johnson*, at p. 531.) "The trial court's determination regarding a defendant's competence must be upheld if supported by substantial evidence." (*Ibid.*) Finally, "trial courts should avoid

making an incompetence finding without an expert's evaluation." (*People v. Miranda* (2015) 236 Cal.App.4th 978, 988.)

The court appears to have exercised its discretion under *Edwards* to make an incompetency finding and thus denied Gates's second *Faretta* motion. However, *Edwards* does not apply here because there is not substantial evidence that Gates is a "gray area" defendant, one who is competent to stand trial but so severely mentally ill as to be incompetent to present his own defense. There is no evidence in the record that Gates is mentally ill, let alone severely so, because after being examined by a duly authorized and qualified psychologist, Gates was found competent to stand trial. Therefore, Gates was also competent to present his own defense under California law.<sup>2</sup> There is no evidence in the record that Gates's status changed from the time of the competency hearing to the time of the readiness conference. The court did not identify any additional evidence to support the incompetency finding, referencing only Gates's attorney's prior concern. In its statement of reasons for denying Gates's motion, the court omits that Gates was subsequently found competent. These errors warrant reversal.

Additionally, the court refused to let Gates speak until after it had denied Gates's motion to represent himself, at which point the court reviewed the record and asked for an historical recap of Gates's self-representation from the prosecutor instead of

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<sup>2</sup> The court's statement that "the threshold for [standing trial] is much lower than representing yourself and being competent" cannot support its finding of incompetence because it states an incorrect standard. In California, the standards for standing trial and self-representation are the same (*Johnson, supra*, 53 Cal.4th at p. 530), and Gates was found to meet this standard.



questioning Gates as to the motives behind his motion. The court did not inquire into Gates's intellect or understanding of the proceeding; nor did it ask why Gates previously relinquished his pro per status, or why he was unhappy with his counsel a second time, as is required with a *Faretta* motion. (*Lopez, supra*, 71 Cal.App.3d at pp. 572-574.)

Despite this, after his motion was denied, Gates demonstrated he was making a knowing and intelligent choice to proceed in pro per by stating his understanding of the seriousness of his case, his understanding of the *Faretta* motion process, particularly the court's discretion to deny an untimely motion, and by showing a clear understanding of his constitutional rights. Gates stated that he wanted to represent himself because he believed his counsel could not make the jurisdictional arguments that he wanted to make in his defense. This indicates that Gates acted knowingly, with an understanding of what he was doing and why.

While Gates went on to make unusual claims, saying that he would like to "call for equitable of estoppel and bias so that [he could] file under Civil Rules and Procedures 37A of compelling answers as to why that is," this seemingly nonsensical statement does not rise to a level of incompetence because it shows merely a lack of understanding of the law. However, Gates's misunderstanding of the law is irrelevant to a *Faretta* motion. (*Windham, supra*, 19 Cal.3d at p. 128.) A competent defendant may present any legal arguments he or she wishes, regardless of merit. (*U.S. v. Johnson* (9th Cir. 2010) 610 F.3d 1138, 1147 [absent mental illness or uncontrollable behavior, defendant has right to present unorthodox defenses].) Gates was found competent and, thus, his

inapplicable legal claims were not a proper ground for denying him his Sixth Amendment right to self-representation.

Therefore, despite the court's failure to inquire as to Gates's "intellectual capacity" and understanding of legal procedures, or to advise him of the " 'dangers and disadvantages of self-representation,' " or of his forfeiture of an ineffective assistance of counsel claim, as required in a *Faretta* motion, the record indicates that Gates made his motion knowingly and intelligently. (*Lopez, supra*, 71 Cal.App.3d at pp. 572-574.) As Gates was also competent, he satisfied the first requirement under *Faretta*.

## 2. *Timely*

Gates contends that his second *Faretta* motion was timely. We agree.

Gates's trial was continued three times at the request of both the People and Gates and, in the last instance, by Gates's attorney due to a scheduling conflict. When Gates requested a continuance while pro per the first time, the court gave him double the time he requested. Gates's first *Faretta* motion was granted on the date that trial was to begin, but the People had already asked for a continuance due to a counting error that rendered the District Attorney unprepared for trial at that time. Gates's second pro per motion was made on the date of the readiness conference, approximately a month prior to the trial date, and Gates did not request a continuance. In denying Gates's motion, the court alluded to timing, stating that "the case is getting old."

To be timely, a defendant must make the motion within a reasonable time before trial so as not to use a *Faretta* motion as a delaying tactic. (*Windham, supra*, 19 Cal.3d at pp. 127-128.) There is no bright line rule for timeliness, but rather, courts should

consider the "totality of the circumstances that exist in the case at the time the self-representation motion is made." (*People v. Lynch* (2010) 50 Cal.4th 693, 724, abrogated on other grounds in *People v. McKinnon* (2011) 52 Cal.4th 610, 637.) If a defendant makes a *Faretta* motion on the eve of trial or after trial has commenced, the trial court may exercise discretion to decide such an untimely motion, and the court is then permitted to consider the age of the case when exercising that discretion. (*Windham*, at p. 128.)

To deny Gates's second motion based on the age of the case was not a proper reason for denial here. Timeliness refers to distance before trial, not the age of the case. (*Windham*, *supra*, 19 Cal.3d at pp. 128-129.) Gates made his second motion within a reasonable time before trial commenced, and he did not request a continuance; thus, it was timely.<sup>3</sup>

### 3. *Unequivocality*

Gates contends that his motion was made unequivocally. The People contend that Gates was equivocal because he relinquished his pro per status before seeking to represent himself again and did not proffer a new reason for seeking pro per status a second time. The People concede that Gates was not satisfied with his defense but claim

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<sup>3</sup> Additionally, the court's comment that "I think you should think about it a lot, since you have [eight] prior strikes and I made your offer of 45 years instead of 50, but you are looking at a lot more time [than] that," is also an improper reason for denying Gates's motion because "the nature of the charge" or possible consequences of conviction are "irrelevant to the decision to grant or deny a timely proffered *Faretta* motion." (*Joseph*, *supra*, 34 Cal.3d at p. 945.)

that this shows that Gates's second *Faretta* motion was made out of frustration and, thus, was equivocal. We agree with Gates.

A defendant must invoke his right to self-representation sincerely and unequivocally, that is, not " 'made out of a temporary whim, or out of annoyance or frustration.' " (*Stanley, supra*, 39 Cal.4th at p. 932; *Marshall, supra*, 15 Cal.4th at pp. 21-22.) Using the *Faretta* motion as a method to delay or prolong proceedings by "switching between requests for counsel and for self-representation," shows equivocation. (*People v. Lewis & Oliver* (2006) 39 Cal.4th 970, 1002.)

Gates clearly and consistently expressed his desire to represent himself because he believed that counsel could not present his case the way he wanted it to be presented. Gates first sought pro per status when his first trial date was continued. As a pro per, Gates wrote a motion to dismiss containing his jurisdictional arguments, the arguments that he believed his counsel could not present in the way he wanted. He relinquished his pro per status reluctantly only after prompting by the court and after again stating that his counsel could not fight his case the way that he wanted it fought. Gates's second *Faretta* motion came after months of working with his attorney and reaching the same conclusion that prompted his first motion—as Gates said, "It would be best for me to represent myself . . . Mr. Crawford can't represent certain things in this court, your honor. And so I'm asking for pro per status."

The record indicates that Gates was not using his right to self-representation to delay trial, especially because he did not ask for a continuance, but rather, he sincerely believed that he could represent himself better than his attorney could. This sentiment

remained a constant throughout Gates's case and thus bolsters Gates's sincerely held belief that he could put on the best defense possible at trial. Therefore, Gates's second *Faretta* motion was unequivocal, and his rights were not respected because the court did not allow Gates to present his case the way he wanted it presented. (*McKaskle, supra*, 465 U.S. at p. 177.)

#### DISPOSITON

The judgment is reversed, and the case is remanded to the trial court for new proceedings consistent with this opinion.<sup>4</sup>

HUFFMAN, J.

WE CONCUR:

BENKE, Acting P. J.

NARES, J.

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<sup>4</sup> The parties submitted supplemental briefing regarding the application of newly enacted amendments to sections 667 and 1385 that took effect on January 1, 2019. As other factors warrant reversal here, we decline to opine as to the newly raised issues. Our reversal is without prejudice for Gates to raise these issues directly with the trial court.